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No. .....

Office - Supreme Court, U.S.

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JUN 8 1984

ALEXANDER L STEVENS

CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

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FIRST MULTIFUND ADVISORY CORP.,

*Petitioner,*

v.

HAROLD M. WILLIAMS, PHILIP A. LOOMIS, JR., JOHN R. EVANS, IRVING M. POLLACK, and STEPHEN J. FRIEDMAN, Individually, and Collectively, Constituting the SECURITIES AND EXCHANGE COMMISSION, GEORGE A. FITZSIMMONS, WARREN E. BLAIR, IRVING SCHILLER, PHILLIP D. PARKER, and HOWARD SCHIFFMAN,

*Respondents.*

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**PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

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MILTON MOUND  
1185 Park Avenue  
New York, New York 10128

*Attorney for Petitioner*

13pp



## **Questions Presented for the First Time**

1. Did the respondents violate Article III of the Constitution and usurp powers not granted by Congress by
  - (a) issuing their complaint charging the petitioner and others with "willfully violating the securities laws" and instead of filing their complaint in the proper district court, as the statutes prescribe, electing to force the petitioner to defend itself in SEC's own in-house-court before SEC's nontenured administrative law judge;
  - (b) ordering its staff to present its case for the prosecution at the trial;
  - (c) ordering its own nontenured appointee to act as administrative law judge to preside at the trial, rule on questions of law and fact, and to write the opinion; and finally
  - (d) completing the circle by the non-Article III members of the Commission acting as its own appellate court?
2. Does the petitioner's complaint raise important questions of federal law which have not been, but should be, settled by this Court?
3. Do the decisions below, by granting, at the court's threshold, SEC's motion to dismiss the complaint which raises these questions, and thereby deprive petitioner of its day in court to prove its claims, conflict with applicable decisions of this Court?

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*Respondents.*

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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### Opinions Below

The opinion of the Court of Appeals is reproduced in the Appendix at 1a to 2a. The opinion of the District Court is reproduced at 3a to 20a. The judgment dismissing the complaint is reproduced at 21a.

### Jurisdiction

The judgment of the Court of Appeals for the Second Circuit which affirmed dismissal of the complaint "sub-

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The petitioner has no parent company, subsidiary or affiliate.

stantially on the opinion of Judge Broderick below" with "double costs" was entered March 14, 1984, 1a to 2a. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

### **Constitutional Provisions and Statutes Involved**

Article III of the Constitution provides:

Section 1. The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the Supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under . . . the Laws of the United States . . . (and) to Controversies to which the United States shall be a Party; . . .

The Fifth Amendment provides in relevant part:

"No person shall . . . be deprived of life, liberty, or property, without due process of law; . . ."

The Fourteenth Amendment provides in relevant part:

"No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

The provisions of the Securities Exchange Act of 1934 which grant to SEC authority to conduct investigations, sections 21(a), (b), (c), and then to "bring an action in the proper district court of the United States," 21(d); and section 27 which grants to the district courts "*exclusive* jurisdiction of violations of this title or the rules and regulations thereunder, and of all suits in equity and actions

at law brought to enforce any liability or duty created by this title or the rules and regulations thereunder . . ." are reproduced at 44a to 46a.

Substantially the same provisions of the Investment Company Act of 1940, section 42(a), (b), (c) and (e), and section 44 are reproduced at 46a to 48a.

### **Statement of the Case**

The petitioner and its president, Milton Mound, organized and was the investment advisor for two mutual funds, First Multifund of America and First Multifund for Daily Income, which were registered under the federal securities laws.

From 1978 to 1980 SEC's Enforcement Division conducted a so-called "private investigation during which they and eight unaffiliated directors of those mutual funds, and their personal files, were subpoenaed, examined under oath, and photocopied.

Then, instead of filing suit against those ten persons in the "proper District Court of the United States" as the securities laws prescribe, the Commission by its order dated March 5, 1980 filed its Administrative Enforcement Proceeding listing its charges of alleged violations of the Investment Company Act of 1940 and the Securities Exchange Act of 1934; and without any Constitutional or statutory authority, directed that its charges be tried and adjudicated in its own in-house-court pursuant to its own "Rules of Practice" before a nontenured administrative law judge, the respondent Irving Schiller, who was appointed by the Chairman of the Commission and serves at his pleasure.

On May 12, 1980 the petitioner filed its complaint in this action in the court below, seeking a judgment declaring that Congress had not authorized SEC to file their Proceeding before their own administrative law judge, instead of filing

it in the District Court before a tenured Article III Judge, enjoining them from prosecuting their Proceeding, and for other relief. (22a to 32a).<sup>1</sup>

July 7, 1980 SEC moved to dismiss the complaint "for lack of jurisdiction over the subject matter of the complaint and for failure to state a claim upon which relief can be granted." (33a to 37a).

With the trial of the Proceedings continuing unabated in Washington and New York, and there being no decision on the motion to dismiss, finally on December 23 petitioner moved for summary judgment (38a to 49a) on the ground that SEC, by making the motion to dismiss, should be deemed to admit the allegations in the complaint, that Congress could not, and had not, authorized them to exercise the Judicial Power of the United States which they will continue to exercise unless enjoined.

SEC cross-moved for summary judgment (50a to 57a) and on April 13, 1981 Judge Broderick denied petitioner's motion for summary judgment, and granted SEC's motions to dismiss and for summary judgment (3a to 20a). The court failed to pass on the allegations in the complaint and in the motion for summary judgment, that Congress had not granted Judicial Power to SEC and if it had it would have violated the Constitution.

Petitioner filed a notice of appeal from that judgment to the circuit court. By stipulation and with the circuit court's consent the appeal was withdrawn with leave to reinstate, which has been done.

The trial of SEC's Enforcement Proceeding continued until March 1982. The petitioner declined to put in any defense or to recognize the validity of that Proceeding in any other way.

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<sup>1</sup> The complaint cites the basis for federal jurisdiction: "1. This action arises under Article III, Section 1 of the Constitution, the Securities Act of 1933, the Securities Exchange Act of 1934, and the Investment Company Act of 1940." (22a)

The eight accused unaffiliated directors (evidently learning that the Commission always wins in its own Court) reluctantly signed the "standard consent decree" in which they neither admitted nor denied they had willfully violated stated sections of the law, and agreed to sanctions.

It can be assumed that before December 1982 SEC and their lawyers were aware of *Northern Pipeline v. Marathon Pipe Line*, 102 S.Ct. 2858, decided by this Court in the preceding June, and of its unconditional support for Article III Courts and rejection of nontenured Bankruptcy Judges. Despite that knowledge, on December 29 the nontenured administrative law judge, respondent, Irving Schiller, published a 56 page decision finding, as expected, the petitioner guilty of violating sections of the law and imposing sanctions, just as if he were an Article III Judge in a Court of Law.

That decision was followed by the order bearing the official SEC seal, issued January 31, 1983 by the five non-tenured members of the Commission performing their role as if they were members of an Article III appellate court, declaring that the administrative law judge's decision "has become the final Decision of the Commission."

Thereupon the petitioner exercised its right to reinstate its appeal to the court of appeals. The appeal was argued there March 12, 1984. The Court apparently assuming that many years ago this Court must have sustained the validity of SEC's judicial powers, treated the petitioner's case as frivolous, and on March 14, 1984 published its order that "The judgment of the district court is affirmed substantially on the opinion of Judge Broderick below. The appellees shall recover double costs." (2a).

## Four Reasons for Granting the Writ

In this case the court of appeals has decided two questions of federal law in a way which conflict with applicable decisions of this Court.

In *Northern Pipeline v. Marathon Pipe Line*, 102 S.Ct. 2858 (1982) this Court held:

"the command of Article III (is) that the judicial power of the United States must be vested in courts whose judges enjoy the protections and safeguards specified in that Article." (2867).

After which it was noted that there are only three narrow exceptions to a person's right to be tried in Article III Courts, i.e. when there are:

"Territorial courts established over territories not within the States," (2868); "Courts martial (for) cases arising in the land and naval forces" (2869); and legislative courts and agencies created by Congress to adjudicate cases involving 'public rights'" (2869).

SEC Court and its administrative law judge are conspicuously absent from those three exceptions; further confirming that there is no decision by this Court holding them exempt from Article III.

Nevertheless, in this case the court of appeals has ruled that, despite *Northern Pipeline* and Article III, petitioner can be forced to defend itself in SEC's court before its administrative law judge.

In *Hishon v. King & Spalding*, 52 L.W. 4627 (1984); *Public Affairs Press v. Rickover*, 369 U.S. 111 (1962); and *Aetna v. Haworth*, 300 U.S. 227, this Court has ruled that a complaint should not be dismissed on motion if, as in this case, accepting the allegations as true, the plaintiff would be entitled to relief.

The ruling by the court of appeals, affirming the district court's dismissal of the complaint, is in conflict with these decisions by this Court.

In addition, in this case the court of appeals has decided two questions of federal law which have not been, but should be, settled by this Court.

Has Congress authorized SEC and its administrative law judge to exercise Article III powers?

Has Congress authorized SEC to bring actions to enforce the securities laws, not only in "the proper district court," as the statutes prescribe, but also, at its option, in its own SEC court? By exercising that option in this case has SEC deprived the petitioner not only of its Article III protection but also deprived it of its right to "due process of law" guaranteed by the 5th Amendment and of its right to the "equal protection of the laws" guaranteed by the 14th Amendment, as applied by this Court to the Federal Government and its agencies in *Bolling v. Sharp*, 347 U.S. 497 (1954)?

Children competing in their school yard know instinctively that it is "unfair" for the referee or umpire to be picked by one side; and would denounce anyone who tried it. Common sense and Natural Law require that justice be dispensed in a free society by even-handed impartial judges, not beholden to anyone.

To dispense justice we must have three distinct parties: (1) The plaintiff-complainant; (2) The defendant-respondent; and (3) The impartial judge to decide as fairly as possible between the two adversaries. This is the system Article III was designed to preserve. But under the system SEC imposed on the petitioner and others without their consent, there would be only two parties: (1) SEC being *both* the plaintiff-complainant *and* the judge; and (2) the defendant-respondent.

Can we scoff at injustice and the loss of human rights in totalitarian countries of the left and right, without de-

tecting a striking similarity at home where a law enforcement agency breaks the law?

Judge Patrick E. Higgenbotham recently wrote "Bureaucracy—The Carcinoma of The Federal Judiciary," 31 Alabama Law Review 261, where he said in part:

"If the judiciary is the protector of natural rights, its membership ought to be limited in number, of the highest quality, and isolated from the control of the majority, from which they are charged with protecting constitutional liberties. The judiciary becomes, in a philosophical sense, the ultimate guardian of individual spirit. In the history of governments, the political role of the federal judge is unique. A counterpart does not exist in our English tradition, and certainly not in parliamentary governments. . . . (263)

Regardless whether the role of the Article III judge is wise or unwise, life tenure is central to our present arrangement. And life tenure cannot survive without high judicial competence. It follows that the office must remain unique in order to remain sufficiently attractive to persons of competence and integrity. . . .

The copying is flattering, but by making everyone on the block a judge, we only dilute and diminish the true judicial office—an office central to government. . . . (264)

I am now informed that there are over 1,100 administrative law judges enjoying this tenure. How many of you know how they are selected or to whom they are answerable? Did you know that their salary range is \$42,000 to \$47,500 per annum? . . .

It ought to be noted that my focus now is the impact upon Article III judges of creating thousands of mini-judges. . . . " (269)

The courts below relied on five decisions by this Court, not one of which dealt with Article III or the powers granted by the securities laws to SEC. Those cases are:

*Crowell v. Benson*, 285 U.S. 22 (1932). It arose under the Longshoreman's and Harbor Workers Act. A claim was filed by an employee against his employer, and was decided by the Commission in the employee's favor.

*Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938). It arose under the National Labor Relations Act. "The (union) made to the Board a charge that the (employer) was engaging in unfair labor practices" (44). The Board ordered a hearing on those charges. Instead of attending such hearing the employer obtained from the district court an order enjoining such hearing. The circuit court affirmed. This Court, in ruling that the district court erred in enjoining the Board from holding the hearing authorized by statute, started its decision by noting at page 47:

"First. There is no claim by the Corporation that the statutory provisions and rules of procedure prescribed for such hearing are illegal;"

One may speculate that this Court regretted and therefore called special attention to the fact that the constitutionality of those statutory provisions had not been raised, for which reason it could not and did not pass on them, but left them open to be raised in a later case.

*Shields v. Utah*, 305 U.S. 177 (1938). It arose under the Railway Labor Act which authorized and directed the Interstate Commerce Commission, "upon complaint, of any party interested, to determine after hearing whether any line (is) "interurban" and therefore exempt from the Act.

*United States v. Morton Salt*, 338 U.S. 632 (1950). It arose under § 5 of the Federal Trade Commission Act. The Commission had ordered Morton Salt and others to cease and desist from unlawful pricing and other practices. On appeal from that order the court of appeals affirmed and ordered the corporations to file reports with the Commission showing how they have complied with the court's decree. The United States filed suit to compel com-

pliance with that order. The court below dismissed the complaint. This Court reversed.

*ITT v. Electrical Workers*, 419 U.S. 428 (1974). It arose under the National Labor Relations Act. There the employer filed charges against the union, before the NLRB.

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Mr. Justice BRENNAN, writing for the plurality in *Northern Pipeline* concerning the history of Article III, wrote at pages 2864 to 2867 in relevant part, with emphasis added:

"Basic to the constitutional structure established by the Framers was their recognition that 'The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced *the very definition of tyranny.*' The Federalist No. 47 (J. Madison), p. 300 (H. Lodge ed. 1988). . . . The Federal Judiciary was therefore designed by the Framers to stand *independent of the Executive and Legislature*—to maintain the checks and balances of the constitutional structure, and also *to guarantee that the process of adjudication itself remained impartial.* . . . .

The Court has only recently reaffirmed the significance of this feature of the Framers' design: 'A Judiciary free from control by the Executive and Legislature is essential if there is a right to have *claims decided by judges who are free from potential domination by the other branches of government.*' *United States v. Will*, 449 U.S. 200, 217-218, 101 S.Ct. 471, 481-482, 66 L.Ed.2d 392 (1980).' The Framers thus recognized that 'Next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support. . . . In the general course of human nature, a power over a man's subsistence amounts to a power over his will.' The Federalist No. 79 (A. Hamilton), p. 491 (H. Lodge ed. 1888) (emphasis in original). . . .

'Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and *is a responsibility of this Court as ultimate interpreter of the Constitution.*' *Baker v. Carr*, 369 U.S. 186, 211, 82 S.Ct. 691, 706, 7 L.Ed.2d 663 (1962)."

### **Conclusion**

These are questions of first impression. And the first time this Court has been, as stated in *Northern Pipeline* at 2881, "Called upon to adjudge the legal rights of litigants in actual controversies." And to receive thereby jurisdiction to rule on these vital questions.

The petitioner respectfully suggests to the Solicitor General and to the respondents that, as faithful public servants, they should welcome this unique opportunity to obtain from this Court definitive answers to these questions, removing all doubt about the legality of the respondents' activities challenged in this case; and that they should join in urging that a writ of certiorari be granted.

In any event, whether or not they join, such writ should be granted to review, and ultimately reverse, the decisions below.

Respectfully submitted,

MILTON MOUND  
1185 Park Avenue  
New York, New York 10128  
*Attorney for Petitioner*

June 8, 1984

**Certificate of Service**

I hereby certify that on June 8, 1984 I served the foregoing petition for a writ of certiorari upon counsel by depositing three copies of it in a United States mailbox with first-class postage prepaid, addressed to Gerard S. Citera, Esq., Securities and Exchange Commission, Washington, D.C. 20549, and three copies to the Solicitor General, Department of Justice, Washington, D.C. 20530.

/s/ MILTON MOUND  
MILTON MOUND  
*Attorney for Petitioner*

June 8, 1984

## **APPENDIX**

APPENDIX A

Opinion and Judgment of Court of Appeals for the Second  
Circuit

- 1a -

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

At a stated Term of the United States  
Court of Appeals for the Second Circuit, held  
at the United States Courthouse in the City of  
New York, on the Fourteenth day of March, one  
thousand nine hundred and eighty-four.

P R E S E N T :

HONORABLE HENRY J. FRIENDLY,  
HONORABLE WILLIAM H. TIMBERS,  
HONORABLE THOMAS J. MESKILL,

Circuit Judges.

FIRST MULTIFUND ADVISORY CORP., )

)

Plaintiff-Appellant, ) Docket No.  
) 81-6092

v. )

)

HAROLD M. WILLIAMS, PHILIP A. )

LOOMIS, JR., JOHN R. EVANS, )

IRVING M. POLLACK, and STEPHEN )

J. FRIEDMAN, Individually, and )

Collectively, Constituting the )

SECURITIES AND EXCHANGE )

COMMISSION, GEORGE A. FITZ- )

SIMMONS, WARREN E. BLAIR, )

IRVING SCHILLER, PHILLIP D. )

PARKER, and HOWARD SCHIFFMAN, )

)

Defendants-Appellees.)

- 2a -

This is an appeal from a judgment of the United States District Court for the Southern District of New York, Broderick, J..

This cause came on to be heard on the transcript of record from the said district court and was argued by counsel.

The judgment of the district court is affirmed substantially on the opinion of Judge Broderick below. The appellees shall recover double costs.

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Henry J. Friedly, U.S.C.J.

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William H. Timbers, U.S.C.J.

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Thomas J. Meskill, U.S.C.J.

APPENDIX B

Memorandum Order by Judge Broderick

- 3a -

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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FIRST MULTIFUND ADVISORY CORP.,: 80 Civ. 2717  
(VLB)

Plaintiff, :

- against - : MEMORANDUM  
ORDER

HAROLD M. WILLIAMS, PHILIP A. :  
LOOMIS, JR., JOHN R. EVANS,  
IRVING M. POLLACK, AND STEPHEN :  
J. FRIEDMAN, INDIVIDUALLY, AND  
COLLECTIVELY, CONSTITUTING THE :  
SECURITIES AND EXCHANGE  
COMMISSION, GEORGE A. FITZ- :  
SIMMONS, WARREN E. BLAIR,  
IRVING SCHILLER, PHILLIP D. :  
PARKER, AND HOWARD SCHIFFMAN,

:

Defendants. :

-----X

VINCENT L. BRODERICK, U.S.D.J.

I.

Plaintiff's complaint challenges the authority of the Securities and Exchange Commission ("SEC" or "Commission") to conduct quasi-judicial proceedings. Plaintiffs, a registered broker-dealer and investment adviser, seeks declaratory and injunctive re-

lief with respect to the SEC, its commissioners, its secretary, two of its administrative law judges and two of its staff attorneys. It seeks a declaration that administrative proceedings conducted by the SEC and its officials are illegal, and it seeks to enjoin the SEC from conducting such proceedings.

Plaintiff has moved and defendants have cross-moved for summary judgment.<sup>1</sup> Defendants have also moved for a protective order in response to various of plaintiff's discovery requests. For the following reasons, the cross-motion of defendants for summary judgment is granted, and plaintiff's motion for summary judgment is denied. Accordingly, it is not necessary to determine defendants' motion for a protective order.

II.

Plaintiff claims 1) that the SEC, with particular reference to an administrative proceeding being conducted by it pursuant to

Section 9(b), 15 U.S.C. §80a-9(b), of the Investment Company Act of 1940 and Section 15 (b), 15 U.S.C. §780-b, of the Securities Exchange Act of 1934,<sup>2</sup> has "exceeded the statutory parameters of its authority;" and 2) that by conducting such administrative proceedings, the SEC is "exercising powers which are specifically reserved to Article III courts under the United States Constitution." Plaintiff vigorously asserts that it does not, at this point, intend to raise a constitutional objection to the SEC's activities and questions only the existence of a legislative predicate for the SEC's practices. The thrust of the complaint, however, seems to be that the SEC is exercising powers which are constitutionally reserved to Article III courts (complaint, pars. 10, 11) and that the SEC has not received authorization to exercise such power (complaint, pars. 13-15).<sup>3</sup>

The specific activities complained of seem to fall within three overlapping areas. Plaintiff alleges 1) that the SEC has no authority to order administrative hearings to investigate alleged violations of the securities laws; 2) that the SEC has no authority to delegate to administrative law judges the power to order such hearings, to be presided over by hearing officers who shall take evidence to determine whether the provisions of the Securities Exchange Act have been violated; and 3) that the SEC has no authority to delegate to administrative law judges the power to render decisions and orders in connection with such hearings, where such decisions and orders are to become the final decisions and orders of the SEC unless the parties file a timely petition to the Commission for review.

Plaintiff is mistaken.

The Securities Exchange Act of 1934 ("the 1934 Act") grants broad investigatory and

rule-making powers to the SEC which subsume all of the conduct of which plaintiff complains. Thus 15 U.S.C. §78u(a) authorizes the SEC in its discretion to "make such investigations as it deems necessary to determine whether any person has violated, is violating, or is about to violate any provision of [the Securities Exchange Act or] the rules or regulations thereunder...". It authorizes the SEC, in its discretion, "to investigate any facts, conditions, practices, or matters which it may deem necessary or proper to aid in the enforcement of," inter alia, the Securities Exchange Act and rules and regulations thereunder. 15 U.S.C. §78u(a). For the purpose of carrying out an investigation, the 1934 Act empowers any officer designated by the commission 1) to administer oaths, 2) to subpoena witnesses, 3) to require the production of documents, and 4) to take evidence:

b) For the purpose of any such investigation,... any member of the Commission or any officer designated by it is empowered to administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, or other records which the Commission deems relevant or material to the inquiry. Such attendance of witnesses and the production of any such records may be required from any place in the United States or any State at any designated place of hearing.

15 U.S.C. §78u(b).

Congress in the 1934 Act specifically authorized the Commission to delegate various functions, including that of investigating and that of holding hearings:

(4)... [T]he Securities and Exchange Commission ... shall have the authority to delegate, by published order or rule, any of its functions to a division of the Commission, an individual Commissioner, a hearing examiner, or an employee or employee board, including functions with respect to hearing, determining, ordering, certifying, reporting, or otherwise acting as to any work, business, or matter ...

15 U.S.C. §78d-1.<sup>4</sup>

Investigatory powers are also provided by the Investment Company Act of 1940 ("the

1940 Act"). Thus the 1940 Act authorizes the SEC to make investigations and to compel the production of documents and witnesses in connection with such investigations, and authorizes hearings to be conducted by Commission designees:

(a) The Commission may make such investigations as it deems necessary to determine whether any person has violated or is about to violate any provision of this subchapter or of any rule, regulation, or order hereunder, or to determine whether any action in any court or any proceeding before the Commission shall be instituted under this subchapter against a particular person or persons, or with respect to a particular transaction or transactions. ...

(b) For the purpose of any investigation or any other proceeding ... any member of the Commission, or any officer thereof designated by it, is empowered to administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, contracts, agreements, or other records which are relevant or material to the inquiry.

15 U.S.C. §80a-41.

The Administrative Procedure Act (5 U.S.C. §500 et seq.) also authorizes adjudicative

proceedings within an administrative agency such as the SEC.

The Rules of Practice promulgated by the SEC with respect to hearings are within the rule-making powers of the SEC, and set forth procedures which conform to the requirements of the securities laws and of the Administrative Procedure Act.

H.R. Rep. No. 2045 87th Cong., 2d Sess., reprinted in [1962] U.S. Code Cong. and Adm. News, p. 2150, at 2151, in discussing the need and background for Section 78d-1, states that the legislative objective in enacting the section was "to enable the Commission, through appropriate delegations of responsibility, to provide for more effective administration of the laws for which it is responsible." Commenting upon Section 78d-1 (c)<sup>5</sup> of the Act (which deals with finality of delegated action), the House Report observed: "We would have no difficulty with

this provision if it means that when an adversely affected party does not make a timely request for review by the full Commission, the delegated action is final in the sense that such a party cannot thereafter go to court because he has not exhausted his administrative remedy before the full Commission."

Id.

Thus, Congress fully anticipated significant delegation of authority within the Commission. Since Congress has authorized such delegation by the Commission of "any of its functions" to "a hearing examiner" or to "an employee", subject to the caveat that the Commission retains the discretionary right to review actions taken upon such delegated authority, plaintiff's claim that the Commission does not have authority to delegate the responsibilities for presiding over hearings, or to order such a hearing, is clearly devoid of merit.

There is no claim presented in the plaintiff's pleadings, motions or affidavit alleging any action on the part of the Commission or any agents or officers thereof" which constitutes action which has not been authorized by specific Congressional enactment, or which is not in conformity with rules which have been adopted in accordance with rule-making power given to the SEC by Congress."

### III

I turn to the claim that the administrative proceedings of the SEC are essentially judicial in nature, and as such are reserved to courts authorized under Article III of the Constitution.

With respect to findings of fact by an administrative agency, the United States Supreme Court held as early as 1932 that such findings shall be "final if supported by evidence", and that the use of the administrative method for determining facts with

finality "assuming due notice, proper opportunity to be heard, and that findings are based upon evidence, falls easily within the principle of the decisions sustaining similar procedure against objections under the due process clauses of the Fifth and Fourteenth Amendments." Crowell v. Benson, 285 U.S. 22, 47 (1932). Accord, Shields v. Utah Idaho Central R.R. Co., 305 U.S. 177 (1938); Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938).<sup>6</sup>

In 1950 the Supreme Court, confronted with the proposition that the Federal Trade Commission was "invading the province of the judiciary," noted the availability of judicial review to protect against administrative error or arbitrariness:

These agencies are expected to ascertain when and against whom proceedings should be set in motion and to take the lead in following through to effective results...

To protect against mistakes or arbitrary [agency] orders, judicial review is provided....

United States v. Morton Salt Co., 338 U.S. 632, 640 (1950).

The Securities and Exchange Act, like the Trade Commission Act in question in Morton Salt, supra, provides for review of orders issued by the SEC in the United States Courts of Appeals. 15 U.S.C. §78y(a). This is in keeping with the legislative scheme embodied in the Administrative Procedure Act, particularly as specified in the provisions providing for agency adjudications (5 U.S.C. §554),<sup>7</sup> hearings in conjunction with such agency adjudications (5 U.S.C. §556),<sup>8</sup> and the initial agency decisions resulting therefrom (5 U.S.C. §557).<sup>9</sup>

The Supreme Court has concluded that in defining "adjudication" for purposes of the Administrative Procedure Act as "agency process for the formulation of an order"<sup>10</sup> (where "order" is in turn defined as "the whole or a part of a final disposition")<sup>11</sup>, Congress intended that such "final disposition" at the

administrative level should have some "determinate consequences" for the parties. ITT v. Electrical Workers, 419 U.S. 428 at 443 (1975).

Thus Congress fully intended that administrative agencies such as the SEC would conduct investigations and render determinations regarding perceived violations of the laws, the enforcement of which is the duty of such agency, and the Supreme Court has recognized and upheld directly and indirectly the legality of the administrative procedures followed by such agencies. It is instructive to note that proceedings comparable to those which plaintiff refers to as "Star Chamber Proceedings" were characterized by the Court in ITT v. Electrical Workers, supra, at 445 as the "prototype" of agency process for the formulation of an order:

The prototype... [of such process] is a hearing before an administrative law judge who makes findings of fact and conclusions of law, initially decides

the case, and whose recommended decision "becomes the decision of the agency ... unless there is an appeal to, or review on motion of, the agency." 5 U.S.C. §557(b).

The Court in the Electrical Workers case did not specifically decide the constitutionality of the Administrative Procedure Act. It did, however, determine whether a certain provision of the National Labor Relations Act was part of an "adjudication" under the Administrative Procedure Act..

Plaintiff contends that U.S. district courts have been given exclusive jurisdiction over the enforcement of violations of the securities acts and that the SEC therefore has no authority administratively to inquire into allegations of wrongdoing in violation of the 1934 or 1940 Acts. In Wright v. Securities Exchange Commission, 112 F.2d 89 (2d Cir. 1949), the court denied a similar claim:

The petitioner also contends that the Commission had no jurisdiction to make its order of expulsion because section 27 of the Act, 15 U.S.C.A. §78aa, declares that

the district courts of the United States "shall have exclusive jurisdiction of violations of this chapter". What is meant by section 27 is that all criminal or civil proceedings initiated in the courts for violations of the act must be brought in the courts designated by the section. In that sense those courts have "exclusive jurisdiction." Under the most elementary principles of statutory construction, section 27 must be so interpreted, if possible, as to be consistent with other provisions of the statute. It certainly was not intended to repeal section 25 (a), 15 U.S.C.A. §78y(a), which declares that any person aggrieved by an order issued by the Commission in a proceeding under this title to which such person is a party may obtain a review of such order in a circuit court of appeals, whose jurisdiction is also declared to be exclusive. Nor can it be supposed to have been intended to deprive the Commission of the jurisdiction conferred upon it by section 19 (a) (3) to entertain a proceeding of the character therein expressly authorized. Construing section 27 as we have suggested gives effect to all the sections.

Id. at 95 (footnote omitted).

Despite its disclaimers plaintiff essentially asks this court to find unconstitutional the entire Administrative Procedure Act and much of the legislation affecting the jurisdiction of the SEC. As the Supreme Court remarked

in Crowell v. Benson, supra, 285 U.S. at 62, "When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." (Citations omitted). The role of administrative law in our jurisprudence is solidly established. I reject the suggestion, which necessarily is at the basis of plaintiff's position, that the entire body of administrative law rests upon an unconstitutional foundation

SO ORDERED.

---

Vincent L. Broderick, J.S.D.J.

Dated: New York, New York  
April 7, 1981

FOOTNOTES

1. Defendants previously moved to dismiss the complaint pursuant to Rule 12 (b)(1), (2), (5), and (6) of the Federal Rules of Civil Procedure.
2. In the Matter of First Mutifund Advisory Corp. (and nine other named respondents), Administrative Proceeding File No. 3-5881.
3. The complaint indicates that plaintiff plans to seek the appointment of a three-judge court to consider its claims. I find nothing in the complaint which, under 28 U.S.C. §2284 (a), as amended, must be adjudicated by a three-judge court.
4. Similarly, the Investment Company Act, at 15 U.S.C. §80a-40, provides that "[h]earings may be public and may be held before the Commission, any member or members thereof, or any officer or officers of the Commission designated by it ..."
5. §78d-1(c) provides:

Should the right to exercise such review be declined, or should no such review be sought within the time stated in the rules promulgated by the Commission, then the action of any such division of the Commission, individual Commissioner, administrative law judge, employee, or employee board, shall, for all purposes, including appeal or review thereof, be deemed the action of the Commission.

6. In Crowell the Court addressed the allegedly unconstitutional delegation to the United States

Employees' Compensation Commission of responsibility to determine facts and to require that employers pay reasonable compensation to injured employees.

7. 5 U.S.C. §554 (Adjudications), applies "in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing." "Adjudication" is defined in the Administrative Procedure Act as "agency process for the formulation of an order". 5 U.S.C. §551(7).

8. 5 U.S.C. §556 provides that agency hearings such as those required by §554 will be conducted in accordance with its provisions.

9. 5 U.S.C. §557 provides for, inter alia, initial decisions of the agencies, the conclusiveness, agency review, and recordation thereof.

10. See note 7, supra.

11. 5 U.S.C. §551(6).

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
FIRST MULTIFUND ADVISORY CORP. :

Plaintiff : 80 CIVIL  
              2717 (VLB)

- against - :  
              :

HAROLD M. WILLIAMS; PHILIP A. : JUDGMENT  
LOOMIS, JR.; JOHN R. EVANS;  
IRVING M. POLLACK; and STEPHEN :  
J. FRIEDMAN, etc., et al :  
              :  
              :

Defendants :  
              :  
-----X

Plaintiff having moved for summary judgment and the defendant having cross-moved for summary judgment and also for a protective order; and the said motions having come on before the Honorable Vincent L. Broderick, United States District Judge, and the Court thereafter on April 8, 1981, having handed down its memorandum order denying plaintiff's motion for summary judgment and granting defendants' motion for summary judgment, it is,

ORDERED, ADJUDGED AND DECREED, that the complaint be and it is hereby dismissed.

Dated: New York, N.Y.  
April 13, 1981

APPENDIX C

Complaint

- 22a -

UNITED STATES DISTRICT COURT  
Southern District of New York

---

FIRST MULTIFUND ADVISORY CORP., :

Plaintiff, : Civil Action  
No.  
- against - : 80 Civ.2717

HAROLD M. WILLIAMS, PHILIP A. : COMPLAINT  
LOOMIS, JR., JOHN R. EVANS,  
IRVING M. POLLACK, AND STEPHEN J.:  
FRIEDMAN, INDIVIDUALLY, AND  
COLLECTIVELY, CONSTITUTING THE :  
SECURITIES AND EXCHANGE COMM-  
ISSION, GEORGE A. FITZSIMMONS, :  
WARREN E. BLAIR, IRVING SCHILLER,  
PHILIP D. PARKER, AND HOWARD :  
SCHIFFMAN,  
Defendants. :

---

1. This action arises under Article III,  
Section 1 of the Constitution, the Securities  
Act of 1933, the Securities Exchange Act of  
1934, and the Investment Company Act of 1940.

2. The defendants do not claim they have  
been ordained and established by Congress as a  
Court of the United States pursuant to Article  
III, Section 1 of the Constitution; for which  
reason plaintiff respectfully requests this  
Court to require the defendants, before they

are permitted to continue to conduct themselves as if they were a Court of the United States, to establish that they have a valid warrant and license to act as such Court and to exercise the Judicial Power of the United States, requiring the plaintiff and others to be tried in the defendants' Courts before one of their Administrative Law Judges who may render "his decision and judgment containing his conclusions as to the factual and legal issues presented and an appropriate order".

3. Plaintiff seeks a declaratory judgment pursuant to 28 U.S.C. § 2201 for the purpose of determining that The Commission and the individual defendants have no warrant or license to exercise Judicial Power in the name of the United States Government; and for a judgment temporarily and permanently enjoining them from exercising such Judicial Power over the plaintiff. The matter in controversy exceeds, exclusive of interest and costs, the sum of \$10,000.

4. An application will be made to this Court pursuant to 28 USC § 2284 to convene a district court of three judges.

5. Plaintiff is a corporation incorporated under the laws of the State of New York, having its principal place of business in the State of New York.

6. Defendants are citizens of and resident in the District of Columbia and the State of Maryland and Virginia.

7. The defendant Harold M. Williams is the Chairman of The Securities and Exchange Commission, an agency of the United States Government.

8. Defendants Philip A. Loomis, Jr., John R. Evans, Irving M. Pollack, and Stephen J. Friedman are Commissioners, and together with Chairman Harold M. Williams constitute The Securities and Exchange Commission, herein referred to as (the "Commission" or "SEC").

9. Defendants George A. Fitzsimmons is the Commission's Secretary, Warren E. Blair is the Commission's Chief Administrative Law Judge, Irving Schiller is one of the Commission's seven Administrative Law Judges, and Phillip D. Parker and Howard Schiffman are attorneys for the Commission's Division of Enforcement.

10. Article III, Section 1 of the Constitution provides: "The Judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."

11. The defendants individually and collectively, acting in concert, have been exercising, and unless enjoined by this Court will continue to exercise, the Judicial Power

of the United States over the plaintiff and nine other persons in many ways including:

(a) On or about March 5, 1980, the defendants caused to be instituted what they call an Administrative Proceeding acting under what they assert is the power of the UNITED STATES OF AMERICA, by serving upon the plaintiff and the other respondents their order bearing the following heading:

Administrative Proceeding  
File No. 3-5881

UNITED STATES OF AMERICA  
Before The  
SECURITIES AND EXCHANGE COMMISSION

MAR 5 1980

---

In the Matter of :  
First Multifund Advisory : ORDER FOR PUBLIC  
Corp., (and nine other : PROCEEDINGS AND  
named respondents) : NOTICE OF HEARING  
: PURSUANT TO  
: SECTION 9(b) OF  
: THE INVESTMENT  
: COMPANY ACT OF  
: 1940 AND SECTION  
: 15(b) OF THE  
: SECURITIES EX-  
: CHANGE ACT OF 1934.

---

(b) In that order of March 5, 1980 the defendants assert that:

"In view of the allegations made by the Division of Enforcement, the Commission deems it necessary and appropriate . . . that public proceedings be instituted to determine:

"(1) Whether the allegations set forth in Section II are true, and in connection therewith to afford all parties an opportunity to establish any defense to such allegations; and

"(2) What, if any, remedial action is appropriate in the public interest pursuant to Section 9(b) of the 1940 Act and Section 15(b) of the Exchange Act.

IV

"IT IS HEREBY ORDERED that a public hearing for the purpose of taking evidence on the questions set forth in Section II hereof be held at a time and place to be fixed and before a hearing officer to be designated by further order as provided by Rule 7 of the Commission's Rules of Practice (17 C.F.R. 201.6).

"IT IS FURTHER ORDERED that each party file an answer to the allegations contained in the order for proceedings within fifteen days after service upon him of said order as provided by Rule 7 of the Commission's Rules of Practice (17 C.F.R. 201.7). If any party fails to file the directed answer or fails to appear at a hearing after being duly notified, such party shall be deemed

in default and the proceeding may be determined against such party upon consideration of the order for proceedings, the allegations of which may be deemed to be true.

"This order shall be served upon Respondents personally or by certified mail forthwith. . . .

"By the Commission.

(signed) George A. Fitzsimmons  
Secretary"

(c) On or about March 12, 1980 the defendants caused their order dated that day to be issued by the defendant Warren E. Blair, their "Chief Administrative Law Judge", as follows:

ADMINISTRATIVE PROCEEDING  
FILE NO. 3-5881

UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION  
March 12, 1980

---

In the Matter of :

FIRST MUTIFUND ADVISORY : ORDER SCHEDULING  
CORP., et al. : HEARING AND DESIG-  
: NATING PRESIDING  
: JUDGE  
:

---

IT IS ORDERED that the hearing in this matter shall commence at 10:00 A.M. on Monday, April 14, 1980 in the New York Regional Office, 26 Federal Plaza, New York, New York 10007.

FURTHER ORDERED that Administrative Law Judge Irving Schiller preside at the hearing in these proceedings and perform other and related duties in accordance with the Commission's Rules of Practice.

For the Commission, by its Chief Administrative Law Judge, pursuant to delegated authority.

s/Warren E. Blair  
Chief Administrative  
Law Judge

(d) Section 200.14 of the Commission's Rules (17CFR200.14) provide that in hearings conducted before its Administrative Law Judges, they are to "rule on the admissibility of evidence and on legal and other issues which arise during the course of such proceedings . . . (and) an initial decision is (to be) prepared by the Administrative Law Judge in each case containing his conclusions as to the factual and legal issues presented and an appropriate order."

12. The defendants do not claim that the Commission has been granted a valid warrant and license to delegate to the defendant George A. Fitzsimmons the power to write, sign, and issue in the name of the Commission the above referred to order dated March 5, 1980.

13. The defendants do not claim that the Commission has been granted a valid warrant and license to delegate to the defendant Warren E. Blair the Judicial Power of the United States.

14. The defendants do not claim that the Commission and the defendant Warren E. Blair have been granted a valid warrant and license to delegate to the defendant Irving Schiller the Judicial Power of the United States.

15. Congress has exercised the authority granted to it by Article III, Section 1 in creating the Courts of Appeal, the District Courts, and several courts with jurisdiction limited to specific areas such as the Court of Claims, the Tax Court, the Customs Court,

and the Court of Customs and Patent Appeals; which Courts are conducted by Federal Judges who are appointed for life by the President with the advice and consent of the Senate; and authorized to exercise the Judicial Power of the United States.

16. The defendants Warren E. Blair and Irving Schiller are not Federal Judges appointed for life by the President with the advice and consent of the Senate; and neither of them nor any of the defendant is authorized to exercise the Judicial Power of the United States.

WHEREFORE the plaintiff respectfully asks this Honorable Court to adjudge and declare that defendants have failed to establish that they have been granted any warrant or license to exercise the Judicial Power of the United States, to institute and prosecute against the plaintiff the defendant's Administrative Proceeding No. 3-5881, nor to render any adjudication against the plaintiff; and that the defen-

- 32a -

dants be enjoined temporarily and permanently from prosecuting such Administrative Proceeding; and for a further judgment against the defendants for such sums as will compensate the plaintiff for its damages and expenses, and awarding such other relief as the Court deems just and proper.

Milton Mound  
Attorney for the Plaintiff  
527 Madison Avenue  
New York, New York 10022

APPENDIX D

Motion of Defendants to Dismiss the Complaint  
- 33a -

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

---

FIRST MULTIFUND ADVISORY CORP., : 80 Civ. 2717  
: Plaintiff, :  
v. :  
HAROLD M. WILLIAMS, et al., :  
Defendants. :  
:

---

MOTION OF THE DEFENDANTS  
TO DISMISS THE COMPLAINT

Respectfully submitted,

MICHAEL K. WOLENSKY  
Associate General Counsel

BRUCE F. RINALDI  
Special Counsel

Attorneys for Defendant  
SECURITIES AND EXCHANGE  
COMMISSION  
500 North Capitol Street  
Washington, D.C. 20549  
Telephone No.: (202) 272-2454  
(B. Rinaldi)

Dated: July 7, 1980

OF COUNSEL

Lawrence J. Toscano  
Assistant Regional Administrator

- 34a -

Securities and Exchange Commission  
Room 1102  
26 Federal Plaza  
New York, New York 10278

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

---

FIRST MULTIFUND ADVISORY CORP.,:

Plaintiff,	:	
v.	:	80 Civ. 2717
HAROLD M. WILLIAMS, <u>et al.</u> ,	:	MOTION OF
Defendants.	:	THE DEFENDANTS
	:	TO DISMISS
	:	THE COMPLAINT
	:	

---

The Securities and Exchange Commission and the Commission officers named in their official capacities as defendants herein respectfully move this Court to dismiss the complaint, with costs for the defendants, in accordance with Rules 12(b)(1) and 12(b)(6), Federal Rules of Civil Procedure, for lack of jurisdiction over the subject matter of the complaint and for failure to state a claim upon which relief can be granted.

Additionally, the individual defendants named herein respectfully move this Court to dismiss the complaint, with costs for the defendants, so far as it seeks damages against

them personally, in accordance with Rules 12 (b) (1), 12(b) (2), 12(b) (5) and 12(b) (6), Federal Rules of Civil Procedure, for lack of jurisdiction over the subject matter of the complaint, lack of jurisdiction over the person, insufficient service of process, and failure to state a claim upon which relief can be granted.

The grounds for this motion are set forth in the accompanying Memorandum of Law in Support of the Motion of the Defendants to Dismiss the Complaint.

Respectfully submitted,

---

MICHAEL K. WOLENSKY  
Associate General Counsel

---

BRUCE F. RINALDI  
Special Counsel  
Securities and Exchange  
Commission  
500 North Capital Street, N.W.  
Washington, D.C. 20549  
Telephone (202) 272-2454

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Dated: July 7, 1980

OF COUNSEL

Lawrence J. Toscano  
Assistant Regional Administrator

Securities and Exchange Commission  
Room 1102  
26 Federal Plaza  
New York, New York 10278

APPENDIX E

Notice of Motion for Summary Judgment  
- 38a -

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

---

FIRST MULTIFUND ADVISORY CORP.,	:	
Plaintiff,	:	80 Civ.2717
v.	:	V.L.B.
HAROLD M. WILLIAMS, <u>et al.</u> ,	:	NOTICE OF
Defendants.	:	MOTION FOR
	:	SUMMARY
	:	JUDGMENT
	:	

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

---

SECURITIES AND EXCHANGE	:	
COMMISSION,	:	
Applicant,	:	M 11-188
v.	:	V.L.B.
MILTON MOUND,	:	
Respondent.	:	
	:	

---

TO: Michael K. Wolensky  
Associate General Counsel

Bruce F. Rinaldi  
Special Counsel

Securities and Exchange Commission  
500 North Capitol Street, N.W.  
Washington, D.C. 20549

- 39a -

Notice is hereby given that upon the annexed affirmation of Milton Mound dated December 23, 1980 and upon the Complaint in 80 Civ. 2717 and all other relevant papers in both matters, the Motion of the Plaintiff in 80 Civ. 2717 and of the Respondent in M 11-188, for Summary Judgment will be placed upon the motion calendar of the Court and a ruling thereon sought from the Honorable Vincent L. Broderick, Judge, United States District Court for the Southern District of New York, Room 3004, United States Courthouse, Foley Square, New York, New York, on the 2nd day of January 1981, at 2:30 o'clock p.m.

---

Milton Mound  
527 Madison Avenue  
New York, New York 10022

Attorney for the plaintiff  
First Multifund Advisory Corp.  
and for Milton Mound pro se

Dated: December 23, 1980

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

---

FIRST MULTIFUND ADVISORY CORP.,	:
Plaintiff,	: 80 Civ. 2717
	: V.L.B.
v.	:
HAROLD M. WILLIAMS, <u>et al.</u> ,	:
	:
Defendants.	:
	:

---

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

---

SECURITIES AND EXCHANGE	:
COMMISSION,	: M 11-188
	: V.L.B.
Applicant	:
	:
v.	:
MILTON MOUND,	:
	:
Respondent.	:
	:

---

AFFIRMATION

I, Milton Mound, respectfully affirm: I am a Member of the bar of the State of New York and admitted to practice before this Court. I am the attorney for the plaintiff in the first case above, and am the respondent appearing pro se in the second case.

It is respectfully suggested that both cases can be, and should be, disposed of summarily by this Court without requiring any testimony, trials, or other delay; simply by ruling on one question of statutory construction which never before has been directly presented for judicial answer. That question is:

Has Congress granted to the Securities and Exchange Commission (the "Commission" or "SEC") jurisdiction of alleged violations of the Securities Exchange Act of 1934 and of the Investment Company Act of 1940; and authority to prosecute those it accuses of such violations, in its own SEC Court before its own appointee whom it designates as an Administrative Law Judge, to preside at the trial, render judgment and impose sanctions which shall be binding and final, subject to appeal to the Commission?

If this Court rules "YES", automatically SEC's motion to dismiss the Complaint now

pending in 80 Civ. 2717 will be granted; the SEC Enforcement Proceeding No. 3-5881 will continue; and its subpoena which is the subject of M 11-188 will be valid.

If this Court rules "NO", as we urge it should, SEC in its discretion can file a new action in this Court making its accusations against the respondents named in its Enforcement Proceeding No. 3-5881; that Proceeding will terminate; and its subpoena will be moot.

The Court is respectfully urged to rule "NO" because of the explicit provisions quoted below from the 1934 and 1940 Acts which are cited by SEC as the basis for their Enforcement Proceeding No. 3-5881, and for their Application M 11-188. In both statutes Congress, aware of Article III of the Constitution, irrefutably separated investigation power, which it granted to SEC (1934 Act §21; 1940 Act §42), from judicial powers to enforce those laws and to punish violators, which powers Con-

gress expressly granted to the Federal Courts and from which Congress excluded SEC (1934 Act §27; 1940 Act §44).

The basic structure of both statutes (as will be shown below by extensive quotations from them) is to authorize SEC to conduct investigations to ascertain facts (including using subpoenas) and then either

- (a) "bring an action in the proper district court of the United States...to enjoin such acts or practices... (by applying) to the Court for writs of mandamus, injunctions, and orders commanding (persons) to comply with the provisions of this title", or
- (b) "transmit such evidence... as may constitute a violation of any provision of this title... to the Attorney General, ..."

SEC is not — repeat not — authorized to exercise judicial power which is granted exclusively to the Courts.

The relevant portions of those statutes showing such separation of investigation powers from judicial powers, and the exclusion of SEC and all others, except the Courts, from the judicial powers, (with emphasis added) are:

THE 1934 ACT:  
INVESTIGATIONS; INJUNCTIONS AND PROSECUTION  
OF OFFENSES

Section 21.(a) The Commission may, in its discretion, make such investigations as it deems necessary to determine whether any person has violated, is violating, or is about to violate any provision of this title, (or the rules or regulations thereunder,...and may require or permit any person to file with it a statement in writing,...as to all the facts and circumstances concerning the matter to be investigated. The Commission is authorized...to investigate any facts,...to aid in the enforcement of such provisions,....

(b) For the purpose of any such investigation, or any other proceeding under this title, any member of the Commission or any officer designated by it is empowered to administer oaths and affirmations, subpoena witnesses, compel their attendance, (and) take evidence,...which the Commission deems relevant or material to the inquiry....

(c) In case of contumacy by, or refusal to obey a subpoena issued to, any person, the Commission may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, ....And such court may issue an order requiring such person to appear before the Commission...to give testimony touching the matter under investigation or in question.....

(d) Wherever it shall appear to the Commission that any person is engaged or is about to engage in acts or practices constituting a violation of any provision of this title..., it may in its discretion bring an action in the proper district court of the United States, ..., to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices as may constitute a violation of any provision of this title or the rules or regulations thereunder to the Attorney General,....

(e) Upon application of the Commission the district courts of the United States, ...shall have jurisdiction to issue writs of mandamus, injunctions, and orders commanding (1) any person to comply with the provisions of this title,....

#### JURISDICTION OF OFFENSES AND SUITS

Section 27. The district courts of the United States...shall have exclusive jurisdiction of violations of this title or the

rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this title or the rules and regulations thereunder.... Any suit or action to enforce any liability or duty created by this title..., or enjoin any violation of such title...may be brought in any such district.... Judgments and decrees so rendered shall be subject to review as provided in sections 128 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 225 and 349).  
No costs shall be assessed for or against the Commission in any proceeding under this title brought by or against it in the Supreme Court or such other courts.

THE 1940 ACT:  
ENFORCEMENT OF TITLE

Sec. 42. (a) The Commission may make such investigations as it deems necessary to determine whether any person has violated or is about to violate any provision of this title or of any rule, regulation, or order hereunder, or to determine whether any action in any court or any proceeding before the Commission shall be instituted under this title.... The Commission shall permit any person to file with it a statement in writing, concerning the matter to be investigated.

(b) For the purpose of any investigation or any other proceeding under this title, any member of the Commission, or any officer thereof designated by it, is empowered to administer oaths and affirmations, subpena witnesses, compel their attendance, (and) take evidence,...relevant or material to the inquiry....

(c) In case of contumacy by, or refusal to obey a subpena issued to, any person, the Commission may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, .... And such court may issue an order requiring such person to appear before the Commission...to give testimony touching the matter under investigation or in question; ....

(d) Repealed<sup>1</sup>)

(e) Whenever it shall appear to the Commission that any person has engaged or is about to engage in any act or practice constituting a violation of any provision of this title, or of any rule, regulation, or order hereunder, it may in its discretion bring an action in the proper district court of the United States,...., to enjoin such acts or practices and to enforce compliance with this title or any rule, regulation, or order hereunder. Upon a showing that such person has engaged or is about to engage in any such act or practice, a permanent or temporary injunction or decree or restraining order shall be granted without bond. In any proceeding under this subsection to enforce compliance with section 7, the court as a court of equity may, ....appoint a trustee, who with the approval of the court shall have power to dispose of any or all of such assets,.... The Commission may transmit such evidence as may be available concerning any violation of the provisions of this title, or of any rule, regulation, or order thereunder, to the Attorney General...

### JURISDICTION OF OFFENSES AND SUITS

Sec. 44. The district courts of the United States....shall have jurisdiction of violations of this title or the rules, regulations and orders thereunder, and, concurrently with State and Territorial courts, of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of, this title or the rules, regulations, or orders thereunder....Any suit or action to enforce any liability or duty created by, or to enjoin any violation of, this title or rules, regulations, or orders thereunder, may be brought in any such district.... Judgments and decrees so rendered shall be subject to review as provided in sections 1254, 1291, 1292, and 1294 of title 28, United States Code. No costs shall be assessed for or against the Commission in any proceeding under this title brought by or against the Commission in any court.

### CONCLUSION

This Court's ruling in answer to the question posed at page 1 should be a resounding "NO". Congress has not granted to SEC jurisdiction of alleged violations of the laws, nor authority to prosecute those it accuses of such violations. Such jurisdiction and authority has been granted with utmost clarity to the Courts alone and to the exclusion of all others, including SEC.

Is it not the primary duty of the members of the Commission and their vast legal staff to aid this Court in reaching the correct ruling of "YES" or "NO" on this motion by promptly submitting to the Court the exact language of the 1934 Act and the 1940 Act, if any, which they truly believe negates the sections quoted above; or concede that, since no one had previously directly challenged their judicial power in Court, they have had no prior occasion to search for their authorization; but, now that they have searched, they have found no section which would preclude this Court from granting this request for a ruling of "NO"?

The Motion for Summary Judgment should be granted.

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Milton Mound  
527 Madison Avenue  
New York, NY 10022  
Phone: (212) 759-2311

Dated: December 23, 1980

APPENDIX F

Notice of Cross Motion and Cross Motion  
for Summary Judgment and Opposition to Motion  
for Summary Judgment

- 50a -

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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FIRST MULTIFUND ADVISORY CORP., :

Plaintiff, : 80 Civ. 2717  
V.L.B.

v. :

HAROLD M. WILLIAMS, et al., :

Defendants. : NOTICE OF  
AND CROSS  
MOTION FOR  
SUMMARY JUDG-  
MENT AND  
OPPOSITION  
TO MOTION  
FOR SUMMARY  
JUDGMENT

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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SECURITIES AND EXCHANGE COMMISSION, :

Misc. No.  
11-188  
V.L.B.

Applicant, :

v. :

MILTON MOUND, :

Respondent. :

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TO: MILTON MOUND  
527 Madison Avenue  
New York, New York 10022

Notice is hereby given that the Securities and Exchange Commission, Applicant in Misc. No. 11-188, and Harold M. Williams, et al., defendants in 80 Civ. 2717 (collectively, "the

Commission") will cross move this Court for summary judgment in First Multifund Advisory Corp. v. Harold Williams, et al., and that said motion will be placed on the motion calendar of the Court and a ruling sought thereon from the Honorable Vincent L. Broderick, Judge, United States District Court for the Southern District of New York, Room 3004, United States Courthouse, Foley Square, New York, New York, on January 12, 1981. The Commission moves this Court for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure as it is entitled to judgment as a matter of law and there is no genuine issue as to any material fact.

The grounds for this motion are set forth in the accompanying Memorandum of Points and Authorities in Support of the Cross Motion for Summary Judgment. A proposed order granting the cross motion for summary judgment is submitted herewith.

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Additionally, the Commission opposes Mr. Mound's Motion for summary judgment in Securities and Exchange Commission v. Milton Mound as this Court has entered a final order in that case and thus there are no further matters of law to be resolved.

Respectfully submitted,

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LINDA D. FIENBERG  
Assistant General Counsel

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DOUGLAS J. SCHEIDT  
Attorney

Attorneys for Defendants  
and Applicant

Dated:  
January 2, 1981

Securities and Exchange  
Commission  
500 North Capitol Street  
Washington, D.C. 20549  
Telephone: (202) 272-2454

Of Counsel  
LAWRENCE J. TOSCANO  
Assistant Regional Administrator  
Securities and Exchange Commission  
Room 1102  
26 Federal Plaza  
New York, New York 10278

APPENDIX G  
Statement Material Facts  
as to which there are no genuine issues  
- 53a -

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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FIRST MULTIFUND ADVISORY CORP.,:

Plaintiff, : 80 Civ. 2717

v. : V.L.B.

HAROLD M. WILLIAMS, et al., :

Defendants. : STATEMENT  
: OF MATERIAL  
: FACTS AS TO  
: WHICH THERE  
: ARE NO  
: GENUINE ISSUES

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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SECURITIES AND EXCHANGE  
COMMISSION,

Applicant, : Misc. No.  
: 11-188  
: V.L.B.

v. :

MILTON MOUND,

Respondent. :  
:

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Pursuant to Local Civil Court Rule 9(g),  
the Securities and Exchange Commission and  
Harold M. Williams, et al., defendants in  
80 Civ. 2717 (collectively, "the Commission"),  
by their undersigned counsel, hereby state the  
material facts as to which there are no genuine  
issues as follows:

(1) On March 5, 1980, the Commission instituted Administrative Proceeding No. 3-5881, In re the Matter Of First Multifund Advisory Corp., et al., pursuant to Section 9(b) of the Investment Company Act of 1940, 15 U.S.C. 80a-9(b), and Section 15(b) of the Securities Exchange Act of 1934, 15 U.S.C. 780(b), and issued an Order for Public Proceedings and Notice of Hearing to determine (a) whether First Multifund Advisory Corp. ("First Multifund"), a registered broker-dealer and investment advisor, Milton Mound, and the other named parties, had violated certain provisions of the federal securities laws set out in the order, and (b) what, if any, remedical action by the Commission was appropriate. That proceeding currently is pending.

(2) On May 12, 1980, First Multifund filed a complaint in the United States

District Court for the Southern District of New York charging each of the Commissioners "individually and collectively constituting the Securities and Exchange Commission," the Commission's Secretary, two Commission administrative law judges, and two Commission staff attorneys with improperly instituting the administrative proceeding against First Multifund without "warrant or license to exercise judicial power in the name of the United States Government." The Commission moved to dismiss the complaint on July 7, 1980.

(3) Pursuant to the Commission's Order of Proceedings, on June 24, 1980, Mr. Mound was served with a subpoena ad testificandum directing him to appear and testify at the administrative proceeding. Although Mr. Mound was ordered by the presiding administrative

law judge to appear and give testimony on three occasions, Mr. Mound refused to do so.

(4) By Application dated November 26, 1980, the Commission applied to this Court for an order requiring Milton Mound to appear and show cause why he should not be further ordered to appear on a date to be set by this Court and to testify pursuant to the subpoena. The show cause order was granted; a hearing was held on December 9, 1980, after which Mr. Mound was ordered to appear and testify at the administrative proceeding on December 16, 1980 and at such adjourned time as consented to by the Commission. Mr. Mound presently is scheduled to appear and testify at the administrative proceeding on January 6, 1980.

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Respectfully submitted,

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LINDA D. FIENBERG  
Assistant General Counsel

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DOUGLAS J. SCHEIDT  
Attorney

Attorneys for Defendants  
and Applicant

Dated:                           Securities and Exchange  
January 2, 1981               Commission  
                                  500 North Capitol Street  
                                  Washington, D.C. 20549  
                                  Telephone: (202) 272-2454

Of Counsel  
LAWRENCE J. TOSCANO  
Assistant Regional Administrator  
Securities and Exchange Commission  
Room 1102  
26 Federal Plaza  
New York, New York 10278

FILED

JUN 8 1984

No. 83-2015

ALEXANDER L. STEVENS

CLERK

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1983

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FIRST MULTIFUND ADVISORY CORP.,

*Petitioner,*

v.

HAROLD M. WILLIAMS, PHILIP A. LOOMIS, JR., JOHN R. EVANS, IRVING M. POLLACK, and STEPHEN J. FRIEDMAN, Individually, and Collectively, Constituting the SECURITIES AND EXCHANGE COMMISSION, GEORGE A. FITZSIMMONS, WARREN E. BLAIR, IRVING SCHILLER, PHILLIP D. PARKER, and HOWARD SCHIFFMAN,

*Respondents.*

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**SUPPLEMENTAL BRIEF IN SUPPORT OF  
PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

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MILTON MOUND  
1185 Park Avenue  
New York, New York 10128

*Attorney for Petitioner*

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This Court's recent decision in *Securities and Exchange Commission v. Jerry T. O'Brien Inc.*, 52 LW 4815 was published June 18, 1984, after the petition for the writ in this case was filed on June 8, 1984.

That decision and *Northern Pipeline*, 458 U.S. 50, 102 S.Ct. 2858 (1982) point up and highlight the need for and timeliness of this case. *O'Brien* held at 4816, with emphasis added:

“Congress has vested the SEC with broad *authority to conduct investigations* into possible violations of the federal securities laws . . . (and) the Commission is authorized to *bring suit in federal court* to compel compliance with its process. . . .”

It is respectfully suggested that the present case is an appropriate sequel to *O'Brien* and *Northern Pipeline*. No court has ever decided, and this Court now is respectfully requested to decide, whether or not

“Congress has vested the SEC with broad authority to (*elect not*) to bring suit in federal court” but instead to bring suit in its own in-house-court before its own nontenured administrative law judges.

That question is raised in the complaint. The SEC does not claim Congress has granted it that choice; and that, if granted, it would not violate Article III sections 1 and 2, and the 5th and 14th Amendments. The district court avoided that question by granting SEC's motion to dismiss the complaint. The circuit court affirmed on the district court's opinion.

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The Solicitor General by notice dated June 22, 1984 waived the “right to file a response to the petition in this case, unless requested to do so by the Court.”

Petitioner respectfully urges that, to save the Court's time and in the interest of justice, the Solicitor General should be requested to file a response, *which could terminate this case at once.*

1.—Then he could either concede Congress has not granted to SEC and its nontenured administrative law judges, authority to exercise the Judicial Power of the United States, concurrently and in competition with the district courts; —Or he could quote the sections of the statutes SEC and he rely on (if they can find any) to support their effort to avoid review of the judgment.

2.—He could either concede that even if Congress had expressly granted such adjudicatory powers to SEC and to its administrative law judges, such grant would violate Article III as this Court has enforced it in *Northern Pipeline* and its antecedents;—Or he could state his reasons for disagreeing.

3.—He could either concede that the court below erred in affirming dismissal of the complaint before trial, without even mentioning *Northern Pipeline*; *Hishon v. King & Spalding*, 52 L.W. 4627 (1984); *Public Affairs Press v. Rickover*, 369 U.S. 111 (1962); and *Aetna v. Haworth*, 300 U.S. 227;—Or he could state his reasons for disagreeing.

4.—He could either concede that this is a case of first impression which raises important questions of federal law which have not been and should be settled by this Court;—Or he could state his reasons for disagreeing.

Respectfully submitted,

MILTON MOUND  
*Attorney for Petitioner*  
1185 Park Avenue  
New York, N.Y. 10128

**Certificate of Service**

I hereby certify that on July 3, 1984 I served the foregoing supplemental brief upon counsel by depositing three copies of it in a United States mailbox with first-class postage prepaid, addressed to Gerard S. Citera, Esq., Securities and Exchange Commission, Washington, D.C. 20549, and three copies to the Solicitor General, Department of Justice, Washington, D.C. 20530.

/s/ MILTON MOUND

MILTON MOUND

*Attorney for Petitioner*

July 3, 1984